QUESTIONS PRESENTED

1. Did the Fifth Circuit apply the correct legal test when determining that Petitioner's claim that his Eight Amendment rights under the Cruel and Unusual Punishment Clause was not violated as the result of a single incident of force by the respondents which did not cause a significant injury?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals for the Fifth Circuit were petitioner Keith J. Hudson, a prisoner at the Louisiana State Penitentiary and the respondents Jack McMillian, Marvin Woods, and Arthur Mezo, all correctional security officers at the Louisiana State Penitentiary.

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NUMBER: 90-6531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

KEITH HUDSON
PETITIONER

VERSUS

JACK MCMILLAN, MARVIN WOODS,
AND ARTHUR MEZO
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

The respondents, Jack McMillian, Marvin Woods, and Arthur Mezo, respectfully request that This Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's Opinion in this case. That Opinion is unreported.

STATEMENT OF THE CASE

Petitioner, Keith J. Hudson, (Prisoner Hudson) is a prisoner confined at the Louisiana State Penitentiary (L.S.P.) which is a maximum security prison housing only adult male's

convicted of felonies by a Louisiana state court. Respondents, Jack McMillian, Marvin Woods, and Arthur Mezo, are all correctional officers working at L.S.P.

Prisoner Hudson invoked 42 U.S.C. § 1983 and sued Corrections Officers McMillian, Woods and Mezo in the United States District Court for the Middle District of Louisiana alleging that his Fifth, Fourteenth and Eighth Amendment rights were violated because excessive and unnecessary force was used on him. The parties consented to having the case adjudicated before a Magistrate Judge pursuant to 28 U.S.C. § 636 (c). Following a bench trial before the Magistrate Judge, the factual determination was made that on October 30, 1983 Prisoner Hudson while in restrains, got into an argument with Corrections Officer McMillian who punched Prisoner Hudson in the mouth, eyes, chest, and stomach while Corrections Officer Woods kicked Prisoner Hudson on his backside. During this physical alteration Corrections Officer Mezo, the supervisor of Corrections Officers McMillian and Woods, watched the beating but did nothing to stop it.

As a result of this physical altercation Prisoner Hudson alleged that his partial dental plate was cracked, his lower lip was split and his teeth loosened. Prisoner Hudson also claimed that he received bruises to his body but no other cuts. A review of Prisoner Hudson's medical record revealed that he appeared at sick call on October 31, and November 1, 1983 with a dental complaints; his medical records made no reference to facial bruises or other cuts nor did Prisoner Hudson make complaints

about other injuries. None of the alleged injuries required any medical care. The alleged injuries were short in duration and had no lasting effect.

The Corrections Officers denied that they used any force on Prisoner Hudson on October 30, 1983. The Magistrate Judge gave creditability to Prisoner Hudson's and his fellow prisoner's testimony and not that of the Corrections Officers. The Magistrate Judge found that the force used was totally unnecessary and resulted in minor bruises and swelling to Prisoner Hudson's face, mouth and lip. The Magistrate Judge concluded that Prisoner Hudson's injuries were minor and required no medical treatment. Based on these factual findings the Magistrate Judge found that the Corrections Officers violated Prisoner Hudson's Eighth Amendment right to be free from the application of excessive and unnecessary force and awarded Eight Hundred Dollars ($800.00) in retrospective money damages.

The Corrections Officers appealed to the United States Court of Appeal for the Fifth Circuit. A panel of the Fifth Circuit accepting the findings of fact as true applied the legal test for such claims as set out in Huguet v. Barnett, 900 F. 2d 838, 841 (5th Cir. 1990). This legal test had not been established prior to the ruling by the District Court. Accepting the factual determinations of the District Court and applying the intervening legal test set out in Huguet, the Fifth Circuit concluded that Prisoner Hudson did not prove the essential element of significant injury under his Eight Amendment claim.

The Fifth Circuit reversed the judgment of the District Court. Prisoner Hudson filed for a rehearing before the Fifth Circuit, which was denied. He now seeks review in this Court.

(REASON FOR DENYING THE WRIT)

THE FIFTH CIRCUIT APPLIED THE CORRECT LEGAL TEST TO PRISONER HUDSON'S CLAIM

Prisoner Hudson appears to be arguing in his petition that the legal test applied by the District Court rather than the legal test applied by the Fifth Circuit was the proper legal test to apply to the facts of his claim. (Petition p. 3-4) Corrections Officers McMillian, Woods and Mezo assert that the legal test applied by the Fifth Circuit was the proper legal test to apply to the facts of Prisoner Hudson's claim.

This suit presents the prototypical example of prisoner pro se litigation under 42 U.S.C. § 1983 that proliferates in the lower federal courts. This suit involves a single isolated incident in which a state prisoner alleges that he has been mistreated by one or more State Corrections Officers. This suit, like so many others that involve single instances of alleged mistreatment by State Corrections Officers, boils down solely to a question of credibility - the prisoners giving one story, the corrections officers another, and a lack of demonstrative evidence to support either side. In the instant suit Prisoner Hudson and his fellow prisoner witnesses claimed that physical force was used on Prisoner Hudson by Correction Officers McMillian and Woods while Corrections Officer Mezo watched.

Corrections Officer Woods denied that any physical force was used on Prisoner Hudson by either himself or Corrections Office McMillian. There was no documentary evidence to support use of physical force or any injuries which might have resulted. The allegations of Prisoner Hudson as to the use of force and resulting injuries were corroborated by testimony of two fellow prisoners. The trier of fact gave credibility to the prisoners' story and not the Corrections Officers' story. The trier of law then applied a subjective balancing test in which the existence of any single factor could establish a violation of the Eighth Amendments' Cruel and Unusual Punishment Clause. However, the Fifth Circuit as trier of the law applied a four part essential element test the to facts as found by the trier of fact and determined that Prisoner Hudson did not meet his burden of proof on the essential element of significant injury. It is the four part essential element test of the Fifth Circuit which should be applied to this type Eight Amendment claim.

This Court has determined that excessive force claims brought by prisoners against corrections officers fall solely under the Eighth Amendment's Cruel and Unusual Punishment Clause. Graham v. Connor, 490 U.S. 386, 398-399 (1872-1873), (1989) citing Whitley v. Albers, 475 U.S. 312, 320-321 (1986). There can be absolutely no question that Prisoner Hudson's claim, therefore, rest solely and wholely under the Eighth Amendment's Cruel and Unusual Punishment Clause. Thus Prisoner Hudson's assertions as to his alleged claims under the Fifth and Fourteenth Amendments are without legal merit.

In Whitley this Court dealt with the question of excessive and unnecessary force by correctional personnel on prisoners under the Eight Amendment. In Whitley, however, the need for the use of force was factually present and undisputed, only the degree of need was factually in dispute. Id. 475 U.S. at 320-321. In Whitley the existence of a significant injury was factually present - severe damage to leg and severe mental and emotional distress. Id. 475 U.S. at 317. In the instant case whether or not any force was used at all was factually disputed by the Corrections Officers, therefore, no proof of its need was or could have been presented. Additionally, the injuries alleged by Prisoner Hudson as the result of the force were minor at best. Therefore, the balancing test presented in Whitley provides little if any guidance to the trier of the law for the type of claim raised by Prisoner Hudson. Their is little or no predictability in regards to the out come under Whitley as applied to the facts in the instance case since the extent of the injury is minor and the need for the use of force is not present as a matter of fact. The legal balancing test in Whitley does not work in the prototypical prison suit because the result is unpredictable and provides absolutely no guidance as to what would constitute a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.

Under the balancing test as applied by the District Court in the instant case allows for an Eighth Amendment violation based solely on a single factor and a determination of credibility. This makes the Cruel and Unusual Punishment Clause

a liars contest, rather than a constitutional prohibition. The legal test applied by the Fifth Circuit in the instant case provides for a usable and effective test which has a high degree of predictability regardless of the various factual scenarios.

The legal test in the Fifth Circuit which is applied to all excessive force claims made by prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause is:

1. A significant injury, which;
2. Resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was;
3. Objectively unreasonable, and;
4. The action constituted an unnecessary and wanton infliction of pain.

Each of these four elements must be proven in order for a prisoner to prevail on his excessive and unnecessary force claim under the Eighth Amendment's Cruel and Unusual Punishment Clause. Huguet v. Barnett, 900 F. 2d 838, 841 (5th Cir. 1990) (cite other 5th Cir. cases)

The focus of § 1983 is on the "[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pope, 365 U.S. 167, 184 (1961) quoting U.S. v. Classic, 313 U.S. 299, 325-326 (1941). § 1983 does not, however, reach all misuses of power even if done by those clothed with the authority of state law. § 1983 reaches only those misuses of power which rise to constitutional proportions. See: City of

Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) Not every use of force by corrections officers on prisoners arises to constitutional proportions. Only those uses of force by correction officers on prisoners which shock the conscious of mankind arise to constitutional proportions. Whitley v. Albers, 475 U.S. at 319-320.

This Court has made it clear that mere torts do not rise to constitutional proportions merely because they are committed within a prison setting. This is true whether the act is based on negligence or intentional misconduct. Daniels v. Williamas, 474 U.S. 327 (1986), Davidson v. Cannon, 474 U.S. 344 (1986), Hudson v. Palmer, 468 U.S. 517 (1984) and Paratt v. Taylor, 451 U.S. 527 (1981). The misuse of power must be so serious as to shock the conscious of mankind. Whitley v. Albers, 475 U.S. at 310-320. The mere fact that the misuse of power has no penological purpose is not sufficient to raise a prisoner's claim to the level of cruel and unusual punishment unless a significant injury results. See: Estelle v. Gamble, 429 U.S. 97, 104-107 (1976). Merely because an injury is sustained by a prisoner at the hands of a corrections officer does not create an Eighth Amendment claim. See: Davidson v. Cannon, 474 U.S. at 332-334 and Estelle v. Gamble, 429 U.S. at 104-107. Unless proof of a significant injury exists under the Fifth Circuit's legal standard no Eighth Amendment claim can exist. Under the Fifth Circuit's legal standard all claims similar to that of Prisoner Hudson correctly belong in state rather than federal court. Using the balancing test set out by the District Court in the

instant case every touching in a prison setting becomes a claim of cruel and unusual punishment. The four part essential element test set out by the Fifth Circuit is the correct legal standard to be applied to excessive for claims by state prisoners. Unless this legal standard is used constitutional law under the Cruel and Unusual Punishment Clause will become a mere matter of credibility devoid of any legal standard.

The Fifth Circuit has applied the four part essential element test to a number of prisoner cases. Gilbert v. Collins, 905 F. 2d 61 (5th Cir. 1990), Adams v. Hansen, 906 F. 2d 192 (5th Cir. 1990), Williams v. Luna, 909 F. 2d 121 (5th Cir. 1990), Wesson v. Oglesby, 910 F. 2d 278 (5th Cir. 1990), Oliver v. Collins, 914 F. 2d 56 (5th Cir. 1990). Only one other circuit has examined the Fifth Circuit's four part essential element test. The Sixty Circuit has specifically rejected the use of significant injury or essential elements in excessive force claims arising out of state prisons. See: McHenry v. Chadwick, 896 F. 2d 184 (6th Cir. 1990)

The Fifth Circuit applied the proper legal test to facts in the instant case. There is no basis for reversing the Opinion of the Fifth Circuit in the instant case.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Joseph Erwin Kopsa, a member of the Bar of This Court, hereby certify that on this 12th day of March 1991, three copies of the Respondents Brief in Opposition in the above entitled case was mailed, first class postage prepaid, to Keith J. Hudson, D.O.C. Camp J, Shark Unit #4-L-11, Louisiana State Penitentiary, Angola, Louisiana 70712, pro se for petitioner herein. I further certify that all parties required to be served have been served.

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